No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a Corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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Jurisdiction for Review.

This case comes up on plaintiff's appeal from judgment of the District Court [R. 28] dismissing his first amended complaint on defendant's motion under subdivision 6 of Rule 12(b), F. R. C. P. Jurisdiction of the District Court derived from diversity of citizenship, it being alleged [R. 3] and conceded that appellant is a resident and citizen of California and appellee a New York corporation. (Constitution of the United States, Art. III, Sec. 2; 28 U. S. C. A., Sec. 1332.) The amount in controversy exceeds $3,000.00. Jurisdiction for review is conferred upon this court by 28 U. S. C. A., Secs. 1291 and 1294.

Statement of the Case.

Appellant's amended complaint is for damages for defamation. The facts as alleged in the complaint which are material to appellant's argument are in substance as follows.[1] Appellant is a qualified engineer, who for 17 years had been employed in Argentina and Asia, as well as in the United States, by International General Electric Company (I.G.E.) and foreign subsidiary corporations.[2] In 1950 he resigned and was given a service letter [R. 15-18, Cmplt., Ex. A]. This service letter sets out in considerable detail the jobs appellant had held with I.G.E., states that he had submitted his resignation because he believed his prospects with the Company were unsatisfactory, makes some complimentary remarks about his personality and professional ability, and closes with best wishes for his future success. Appellant further alleges that at the time it gave him this letter, I.G.E. agreed to answer inquiries about appellant and give similar letters to prospective employers in the future.

Six years later appellant applied for jobs with Elliott Engineering Company, Royal Jet, Kool-O-Tron Engineering Company, and Drayer-Hanson Incorporated, who, as prospective employers, addressed inquires about him to I.G.E. Elliott, Royal Jet, Kool-O-Tron and Drayer-Hanson had already read the service letter, as I.G.E. knew was probably the case.

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[1]Since the case was decided on motion to dismiss, appellee is bound to accept all the allegations of the complaint as true, but does so for present purposes only.

[2]I.G.E. was then a subsidiary and is now a division of appellee, General Electric Company.

In response to these four inquiries, I.G.E. wrote four identical letters. These letters are the allegedly defamatory publications of which appellant complains, and read as follows [R. 19, Cmplt., Ex. B]:

> "This is in reply to your letter of March 12 in which you request information concerning Mr. Jules S. Pond.
>
> "The official in International General Electric to whom Mr. Pond reported passed away several years ago, and I am unable to give you first-hand information concerning him. His personnel record with the Company indicates that he had approximately 17 years of service in the International General Electric family. His initial engagement was with General Electric S.A., Argentina. During the early 40's he came to the United States of his own volition, seeking opportunity for engagement here while in the process of securing naturalization as a U. S. Citizen. He was hired by International General Electric after his arrival in the United States, and was assigned to our Air Conditioning and Refrigeration Department. Our records further indicate that he submitted his resignation on August 9, 1950, which was accepted by mutual agreement.
>
> "Insofar as I can determine from his records, we would not be prepared to consider him for re-engagement.
>
> Very truly yours,
> CHARLES MENTZER,
> Specialist-Personnel."

The following statements in these reply letters are alleged to be false [R. 6-7]:

1. The official of I.G.E. to whom appellant reported had died.

2. The writer was unable to give firsthand information concerning appellant.

No other statements in the reply letters are alleged to be false.

The complaint alleges that the reply letters were worded as they were by reason of the malice and ill will of certain I.G.E. employees toward appellant [R. 7].

By way of innuendo, the complaint [R. 8-9] alleges in substance that by the reply letters the four prospective employers were given the impression that the service letter might not be authentic or correct, that I.G.E.'s files contained much information unfavorable to appellant, and that I.G.E. could not truthfully or conscientiously give appellant a favorable report or recommendation. All this is alleged to have been the understanding of the recipients by reason of certain omissions and statements in the reply letters. Appellant contends on the one hand that I.G.E. should have repeated the detailed information contained in the service letter, should have responded specifically to inquiries about his ability and personal characteristics, and should have included favorable statements allegedly indicated by his record. On the other hand, appellant contends that the reply letters should not have disclaimed personal knowledge on the part of the writer, and should not have stated that appellant would not be considered for re-engagement (although the statement is not alleged to have been false).

As extrinsic facts to support the defamatory meaning pleaded in the innuendo, the complaint alleges:

1. The information concerning appellant in the reply letters was of little or no interest to prospective employers [R. 8].

2. Appellant's service with I.G.E. had been entirely satisfactory [R. 9].

3. Appellant was an exceptionally competent engineer [R. 10].

The complaint has four causes of action, one for each of the four reply letters addressed to prospective employers. As to each cause of action, it concludes by alleging that appellant did not get the job, was injured in his reputation and hurt in his feelings. On each count, appellant asked $75,000.00 for loss of salary, $300,000.00 for his hurt feelings and injured reputation, $300,000.00 as punitive damages, and $500,000.00 for prospective damages.

Appellee moved to dismiss the complaint on the ground that no claim in libel was stated because the reply letters were privileged communications which were unambiguous and incapable of defamatory meaning [R. 21]. On the motion, the court had before it [R. 25-27] the inquiry made of I.G.E.'s personnel department by Walter Kidde & Company, Inc., and its reply thereto, alleged in paragraph IX of the complaint [R. 7] to have served as a model for the letters which are the subject of this action.

The motion to dismiss was granted. Appellant having declined to amend further, judgment of dismissal was entered on February 28, 1957 [R. 28], the court finding that the reply letters were not defamatory or susceptible of the meaning attributed to them. Notice of appeal was filed on March 7, 1957 [R. 31].

Relevant Statutes.

California Civil Code, Section 44:

"§44. *Defamation, what.* Defamation is affected (effected) by:

1. Libel;
2. Slander."

California Civil Code, Section 45:

"§45. *Libel, what is.* Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

California Civil Code, Section 45a:

"§45a. (*Libel on its face: Definition: Defamatory language not libelous on its face, when actionable.*) A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

California Civil Code, Section 47:

"§47. (*Privileged publication or broadcast: What constitutes.*) A privileged publication or broadcast is one made—

* * * * * * * *

3. In a communication, without malice, to a person interested therein, (1) by one who is also in-

terested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

* * * * * * * *

California Civil Code, Section 48:

"§48. (Same: When malice not inferred.) In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication."

Issues.

Appellant declined the opportunity to further amend his complaint. The only issue on this appeal is whether or not the reply letters are capable of defamatory meaning when construed in the light of the extrinsic facts alleged in the amended complaint. If they are not so capable, the action was properly dismissed.

Appellee's position has been incorrectly stated by appellant (Op. Br. p. 2). We have never contended that extrinsic facts may not be alleged to support a pleaded innuendo. We contended in the trial court, and contend now, that the reply letters are not reasonably susceptible of the defamatory meaning attributed to them so as to be the foundation of an action for libel, and that the extrinsic facts alleged in support of the innuendo do not change the ordinary, unambiguous and non-defamatory meaning of the language employed. We further contend that the letters are privileged communications and are communications without malice as that term is defined in the statutes and decisions.

ARGUMENT.

It is apparent from reading the complaint that appellant complains not so much of what I.G.E. said, as of what it did not say. The whole burden of the complaint is that I.G.E. should have said something good about appellant and given him a favorable recommendation, and because it did not its silence was defamatory.

Either a publication is defamatory or it is not. If it is not defamatory it cannot be made so by contract, and does not become so merely because there may have been an agreement to say something different. The standard is objective, not that agreed upon by the parties.

We may accordingly dismiss from consideration I.G.E.'s alleged agreement to reproduce the service letter and give appellant a favorable recommendation, and its alleged obligation to respond to specific inquiries. Whatever other consequences may flow from these alleged breaches of duty, they cannot make an innocent publication defamatory.

It should be noted that appellant has filed another separate and distinct action on the same facts, in which he attempted to state a cause of action for breach of contract and a cause of action for negligence.[3] On this appeal he must stand or fall on the theory of libel.

Silence cannot be defamatory, since by definition libel requires a publication. The proposition is so obvious that it appears only once to have received judicial consideration. (*New York, Chicago & St. Louis Railroad Co. v. Schaffer,* 65 Ohio St. 414, 423, 62 N. E. 1036, 1039 (1902).)

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[3]*Pond v. General Electric Company,* No. 19870-BH, Civil, United States District Court, Southern District of California.

The fact is that the allegedly false statements in the reply letters were not injurious or defamatory, and the injurious statements were not false. The gist or sting of the reply letters was that appellant's resignation had been submitted and accepted by mutual agreement, and that he would not be considered for re-engagement. These statements might well not be helpful to appellant in obtaining employment, but *they were true statements and are not alleged to be false.* The allegedly false statements (that the official to whom he had reported was dead and the writer could not give firsthand information) could not possibly be defamatory of appellant.

The complaint shows on its face that the occasion was conditionally privileged. The reply letters were written in answer to inquiries about appellant from prospective employers. They were a proper response to the inquiries received and suitably supplemented the service letter, which any reasonable person would assume prospective employers would already have and which in fact they did have. The allegedly false statements, if they have materiality at all, negate any inference of malice, for as appellant himself pleads [R. 8] they serve at most to give the impression that I.G.E. could have been specific in support of the unfavorable opinion it expressed, but preferred not to be.

Appellant's case cannot rise above the reply letters. It was the function and duty of the trial judge to determine in the context of the facts alleged if the letters were reasonably susceptible of the defamatory meaning and malice attributed to them by the pleader's innuendo. If they were not, it was the duty of the court to dismiss the action.

I.

The Reply Letters Were Conditionally Privileged as in Response to Inquiries About a Former Employee by Prospective Employers. They Were Within the Privilege as a Proper Response and a Suitable Supplement to the Service Letter. They Do Not Permit an Inference or Finding of Malice, and Even if They Did, They Would Still Be Privileged Because All Material Statements Were True.

There is no dispute that the libel law of California governs in this case. (30 Cal. Jur. 2d 684.) Appellant resides in California, and all four reply letters were addressed to prospective employers in California.

As applied to this case, Section 45 of the California Civil Code defines libel as a false and unprivileged publication tending to injure appellant in his occupation. Under the third clause of Subdivision 3 of Section 47 of the Civil Code, the reply letters would be clearly privileged if without malice, even though they contained false statements that tended to injure appellant in his occupation.

If an allegedly injurious publication is true, malice cannot make it libelous, no matter how injurious it may be. Likewise, if an allegedly false publication is not injurious, it is not libelous, no matter how false it is or what degree of malice inspired it.

False statements regarding immaterial matters cannot be the foundation of a libel action, and must be disregarded if the sting or gist of the publication is justified. (30 Cal. Jur. 2d 765-767; *Emde v. San Joaquin Labor Council,* 23 Cal. 2d 146, 160, 143 P. 2d 20, 28 (1943).)

The question for this court to determine is accordingly two-fold. Were there in the reply letters any false statements of material matters tending to injure appellant in his occupation? If there were, were the letters malicious so as to be outside the privilege? The inquiry will be expedited by considering the second question first.

In determining whether the reply letters were malicious, inquiry is directed primarily not to the state of mind of the writer, but to the letters themselves. Malice in the law of civil libel is irrelevant except as affecting privilege, and then refers not to ill will as an abstraction existing in the writer's mind as a sort of disembodied presence, but to applied malice, ill will as expressed in a publication. (Civil Code, Sec. 45.) Section 47 of the Civil Code refers not to a communication *written* without malice, but to a *communication* without malice. Everyone has the right to express a bad opinion in a privileged situation. (*Taylor v. Lewis,* 132 Cal. App. 381, 386, 22 P. 2d 569, 571 (1933).) Malice is not inferred from the mere fact of such a communication. (Civil Code, Sec. 48.) It may, however, be evidenced by the tenor of the communication, when it is inherent in the language employed and is apparent from reading it. (*Brewer v. Second Baptist Church,* 32 Cal. 2d 791, 799, 197 P. 2d 713, 718-719 (1948).) Conversely, when the tenor and character of the language employed in the publication are themselves inconsistent with malice, allegations that the communication was motivated by malice and ill will are of no avail to the pleader in stating a cause of action. (*Morcom v. San Francisco Shopping News,* 4 Cal. App. 2d 284, 290, 40 P. 2d 940, 942 (1935).)

Let us now look at the facts leading to the publication of the reply letters. The four companies which addressed

inquiries to I.G.E. already had the service letter. I.G.E. knew they probably had the service letter. (We would say that the alleged probability was a virtual certainty.)

I.G.E. did not copy out the service letter all over again. We submit there is no malice in that. (In fact, reference to the inquiry from Walter Kidde and Company and the response thereto [R. 26-27], alleged in the complaint [R. 7] to have been the model for the reply letters, indicates that repetition of the service letter was not what was wanted at all.) I.G.E.'s personnel specialist did what any intelligent person would have done. He did not repeat the service letter—he supplemented it.

The service letter was inadequate in but one respect. The statement that appellant had submitted his resignation based on his belief that his prospects with the Company were unfavorable would raise a question in the mind of any prospective employer. Why had he resigned? After 17 years of employment, there must have been a reason why his future prospects were unfavorable. His experience record indicated that he was technically competent. Was there no room at the top, or was there something about appellant that disqualified him from advancement in the opinion of I.G.E.? One more item of information would resolve the doubt. Would I.G.E. consider appellant for re-employment?

In this context, there is nothing wrong with the reply letters. They explain that appellant's resignation had been submitted and accepted by mutual agreement, and that he would not be considered for re-engagement. These statements were true, and I.G.E. was entitled to make them in response to proper inquiry.

The reply letters exactly supplement the service letter. They fill in the gaps and tell a prospective employer who already had the service letter precisely what he would want to know. The false immaterial statements, if they have any significance at all, signify only that I.G.E. was expressing its opinion but would prefer not to be specific as to its reasons.

Nothing would be gained by an inquiry into the minds of I.G.E.'s employees to determine if they harbored ill will toward appellant. The occasion for the reply letters was clearly privileged. They were written within the scope of the privilege and in all material respects truthfully and accurately answered the inquiries made in a common-sense manner. They permit no inference of malice.

II.

It Is the Duty of the Trial Court to Determine Whether a Publication Is Capable of Defamatory Meaning. Since the Reply Letters Were Phrased in Ordinary, Clear and Unambiguous Language, and Were Not Reasonably Susceptible of the Defamatory Meaning and Malice Attributed to Them by the Innuendo, It Was the Duty of the Court to Dismiss the Action.

As we have had occasion to remark, whether the reply letters were defamatory does not depend on the agreement of the parties as to what should or should not have been said. Neither does it depend on the meaning attributed to them by appellant or allegedly attributed to them by the recipients of the letters. The standard by which the reply letters are to be measured is objective and impersonal. It is well settled that the meaning that controls is the common meaning of the words used as they would be understood by the average person.

30 Cal. Jur. 2d 723-724:

> "Where the allegedly defamatory language is in the vernacular of the place of publication, it will be assumed that those who heard or read it understood it in the sense which properly belongs to it. Under such circumstances, the common import of the words must be applied to test its defamatory character. There is no room, in such a case, for the introduction of evidence of witnesses as to their understanding of the language."

3 Restatement of Torts, Sec. 559, Comment (e); 53 C. J. S. 47-48.

It was the duty of the trial judge to determine whether the language of the communications alleged to be false and defamatory is reasonably capable of the defamatory meaning attributed to it by the innuendo. If the court finds that the publication is not reasonably capable of defamatory meaning in the light of the circumstances alleged, there is no question for the jury and the case should be dismissed.

Mellen v. Times-Mirror, 167 Cal. 587, 593, 140 Pac. 277, 279 (1914):

> "It cannot be disputed that it is for the court to determine whether, in the light of such extrinsic facts as are alleged, the writing can be a libel. If, in the light of such extrinsic facts, the article is not fairly susceptible of the defamatory meaning sought to be attributed to it, the complaint fails to state a cause of action. Of course, if the language of the article is capable of two meanings, one of which is harmless and the other libelous, and it is alleged that the same was used and understood as conveying the latter meaning, a cause of action is stated, and it is the province of the jury to determine in which

sense the language was used and understood by the readers of the article. But it is for the judge to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff. (See *Van Vactor v. Walkup,* 46 Cal. 124, 133.)"

31 Cal. Jur. 2d 57;

3 Restatement of Torts, Sec. 614.

It is well settled that if a communication is phrased in ordinary language and is clear and unambiguous, its meaning may not be changed or enlarged by innuendo to include a defamatory meaning which the words do not naturally bear.

31 Cal. Jur. 2d 54:

"It is not in the nature of an innuendo to beget an action, nor is that its purpose. Unless the words used can reasonably be understood in a defamatory sense, the innuendo cannot aid the pleader. Nor can an innuendo be used to give the words charged as defamatory an unnatural or forced meaning. It cannot ascribe to defamatory matter a meaning broader than the words actually used naturally bear, or broader than they bear when read in the light of the inducement. In other words, an innuendo cannot add to, enlarge, extend, or change the natural sense of the published words."

Of the many decisions which could be cited in support of the foregoing propositions, we will mention only those most relevant on their facts. The decisions briefly stated hereinafter make it clear that the courts have consistently declined to enlarge or alter the natural and ordinary meaning of words in the manner contended for by appellant here.

Lorentz v. R.K.O. Radio Pictures, 155 F. 2d 84, 87 (9th Cir., 1946). The statement had been published about a discharged movie producer that he had exceeded his budget, and that defendant hoped that he could be persuaded to return and finish the picture on a reduced budget. Plaintiff had alleged that the publication was intended to mean that he was incompetent and insubordinate. This court declined to enlarge the words used beyond their natural meaning, and affirmed the trial court's order dismissing the cause of action. The facts appear from the opinion, which is worthy of extended quotation:

> "It is charged that the following statements made by the corporation about the time the corporation discharged the appellant concerning the appellant are false and by innuendo defame him: 'That there had already been expended in the production of the first Picture, prior to the time the Corporation ordered the plaintiff to stop production of said Picture approximately $400,000.00; that a total of $400,000.00 was all that was allotted for the entire production of said Picture; that an additional $400,000.00 would be required to complete said Picture; and that the Corporation hoped that plaintiff would be persuaded to return and finish said Picture on a reduced budget.'
>
> "The statements, as held by the trial court, are not reasonably susceptible of meaning, nor is their fair or reasonable import that appellant was incompetent in his work. or that he was unwilling to cooperate or unmindful of the corporation's desire to do business at a profit, or that he refused to cooperate to reduce costs. The appellant sought to attach such meanings by innuendo, but the trial court did not err in holding that such inferences could not fairly be drawn from the statements.

"An explanation in regard to stoppage of production was not unreasonable, and it is far more reasonable to infer from the explanation made that the corporation had expected the picture to be produced for $400,000 but instead another $400,000 would probably be necessary, and the corporation hoped appellant would return and that a means would be devised to lessen the cost. In no way is any fault or blame attributed to the appellant.

"The appellant seeks to attach a meaning beyond the fair and reasonable import of the language used. Ordinarily, an innuendo may not lend a meaning to allegedly defamatory matter different than or broader than the words themselves naturally hold, that is, it cannot add to, enlarge, or change the natural sense of the published words. See Emde v. San Joaquin, Etc., Council, 1943, 23 Cal. 2d 146, 159, 143 P. 2d 20, 150 A. L. R. 916; Bates v. Campbell, 1931, 213 Cal. 438, 442, 443, 2 P. 2d 383; Chavez v. Times-Mirror Co., 1921, 185 Cal. 20, 25, 195 P. 666. Nor may the innuendo be used to give the words an unnatural or forced meaning. See Maas v. National Casualty Co., 4 Cir., 1938, 97 F. 2d 247; Phillips v. Union Indemnity Co., 4 Cir., 1928, 28 F. 2d 701. The court in seeking to determine the possible meaning of the published language in the light of extrinsic facts must look to see if the words are reasonably susceptible of or whether they reasonably could be understood to have the defamatory meaning suggested by the innuendo. See Bates v. Campbell, supra; Chavez v. Times-Mirror Co., supra; Jackson v. Underwriters' Report, Inc., 1937, 21 Cal. App. 2d 591, 69 P. 2d 878. The possible inference that appellant might be unwilling to return at a reduced budget is not defamatory and would not suggest insubordination.

"It has been said that 'In determining whether the words are capable of defamatory meaning the Judge will construe them according to the fair and natural meaning which will be given them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might extract from them,' Gatley, Libel and Slander, 3rd Ed., 1938; and that 'In determining whether the alleged defamatory matter is libelous per se it is the duty of the court to give the language used the natural and popular construction of the average reader, not the critical analysis of a mind trained in technicalities. Sullivan v. Warner Bros. Theatres, Inc., 1941, 42 Cal. App. 2d 660, 662, 109 P. 2d 760, 762. See Western Broadcast Co. v. Times-Mirror Co., 1936, 14 Cal. App. 2d 120, 57 P. 2d 977; Phillips v. Union Indemnity Co., 4 Cir., 1928, 28 F. 2d 701, 702."

Bates v. Campbell, 213 Cal. 438, 442-443, 2 P. 2d 383, 385 (1931). Here the court declined to construe a general reference to a discharged employee's record as implying unfitness for the position held. Omitting citations, the California Supreme Court's opinion on this point reads:

"Should the alleged libelous publication be ambiguous and susceptible of two meanings, one of them harmless and the other injurious, it is necessary for the plaintiff to plead by innuendo the facts upon which he relies to point out the injurious meaning of the writing. * * * However, it is not the purpose of an innuendo to 'beget an action,' and the meaning of the language complained of may not be enlarged or extended thereby. * * * In other words, it is the office of the innuendo to merely explain or interpret, without enlarging, the alleged libelous publication.

"Viewing the alleged libelous communication in the light of these well-established principles of law, we are of opinion that there is merit in respondent's contention that the innuendo contained in the complaint attempts, in some particulars at least, to enlarge and extend beyond its fair and reasonable import the meaning of certain of the statements published of and concerning the appellant. To illustrate: The statement in the letter that 'It would probably serve no useful purpose to recite the circumstances leading to the request for Miss Bates' resignation which in pursuance to such request, was received and accepted by the Board of Trustees on or about July 7, 1927,' may not be construed, as in the complaint here, to mean that 'plaintiff was discharged by the Board of Trustees of the Los Angeles Bar Association for the reason that she was not a fit person to occupy such position.' The statement quoted from the letter makes no reference whatever, either expressly or impliedly, to appellant's fitness or unfitness to occupy such position, and is not therefore reasonably open to the construction attempted to be placed on it. * * *"

Pollard v. Forest Lawn, 15 Cal. App. 2d 77, 81, 59 P. 2d 203, 205 (1936). Pollard was an attorney who filed a libel action on account of the publication of the affidavit of a plaintiff for whom he had been attorney of record in a suit against Forest Lawn. The affidavit stated, in substance, that the affiant had had nothing against Forest Lawn but had been taken to Pollard by certain funeral directors who promised to pay her for the use of her name, and that Pollard and the others told her when she signed the papers that it would cost her nothing and she would probably not have to testify. It was alleged in the innuendo that the publication con-

veyed the meaning that Pollard had filed a suit without authorization, had taken advantage of his client, and had been a party to a conspiracy against Forest Lawn. The District Court of Appeal held that the language of the publication was not reasonably susceptible to any such meaning, and affirmed the judgment of dismissal on demurrer to the complaint, saying, in part (omitting citations):

> "As to the first question it is the duty of the trial court to determine whether the language used in the alleged libelous publication is capable of the defamatory meaning claimed for it by the plaintiff * * * and the innuendo cannot ascribe a meaning to the defamatory matter other or broader than the words themselves naturally bear. It cannot add to nor enlarge nor change the sense of the published words. * * *"
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> * * * * * * * *
>
> "In view of the only reasonable interpretation which can be placed upon the publication, it is readily seen that it does not support the libelous innuendoes alleged by plaintiff, and the trial court properly sustained the demurrer."

In *Emde v. San Joaquin Labor Council,* 23 Cal. 2d 146, 159, 143 P. 2d 20, 28 (1943), the California Supreme Court held that the statement that a dairy had violated its union contract did not permit the innuendo that the dairy was dishonest.

In *Chavez v. Times-Mirror,* 185 Cal. 20, 25, 195 Pac. 666, 669 (1921), the California Supreme Court held that the statement that a certain instance called for investigation by the State Bar Association was not

capable of meaning that the attorney in question was unprofessional or corrupt.

In *Vedovi v. Watson & Taylor,* 104 Cal. App. 80, 87, 285 Pac. 418, 422 (1930), the District Court of Appeal held that a notice cancelling an insurance policy for nonpayment of premium was incapable of meaning that the premium had been misappropriated by the agent who allegedly had collected it:

> "* * * Applying a liberal construction (*Ingraham v. Lyon,* 105 Cal. 254 (38 Pac. 892)), the most that appears from the notice, viewed in the light of the extrinsic facts alleged, is that plaintiff collected the premium from his client and that the Provident Fire Insurance Company or defendant as its agent failed to receive it. There is nothing, either directly or inferentially, to show that plaintiff was entrusted with the premium or fraudulently appropriated it. In short, no words are used in the notice which, even if construed by aid of the extrinsic facts, remotely charge embezzlement.
>
> "But, in the innuendo, the complaint alleges that defendant, by the notice, meant to charge plaintiff with that crime, and was so understood by the Western States Life Insurance Company. As the words in the notice are not actionable *per se,* the innuendo may only interpret their meaning but cannot introduce a meaning broader than the words naturally bear in view of the facts alleged in the inducement. (*Grand v. Dreyfus,* 122 Cal. 58 (54 Pac. 389).) Where the words can bear but one meaning and that is obviously not defamatory, no innuendo can make the words defamatory. * * *"

In *Hearne v. De Young,* 119 Cal. 670, 678, 52 Pac. 150, 153 (1898), the publication of a newspaper article

referring to a murder, and stating that the plaintiff had been the family doctor and one of the first to arrive on the scene, was held not to permit the innuendo that the plaintiff was implicated in the murder.

The foregoing authorities illustrate the reluctance of the courts in libel suits to extend the meaning of words beyond that which they ordinarily convey. The authorities clearly show that a cause of action for libel cannot be made out by the drawing of any such inferences as the appellant seeks to draw from the reply letters in the case at bar.

The reply letters could not possibly have the meaning which they allegedly were intended to convey. The reference to appellant's record of 17 years of service tends to confirm rather than to impeach the service letter. The statements that the official in I.G.E. to whom appellant reported had died and that the writer had no first hand information, although allegedly false, are incapable of the sinister meaning attributed to them by appellant. It is readily understandable that a personnel specialist in New York in 1956 would have no first hand information about a former employee, most of whose service had been in South America and Asia many years before.

The only statements that could possibly have been injurious to appellant were the statements that according to the records appellant had submitted his resignation by mutual agreement and would not be considered for re-engagement. These statements are not alleged to be false. They must therefore be considered to be fair comment on his record and an honest expression of I.G.E.'s opinion, an opinion which I.G.E. was certainly entitled to express in response to inquiry from prospective employers.

A former employer's opinion is a fact in which any prospective employer is interested. That would be especially so in this case where the essential details of appellant's employment record were already made known by the service letter. In fact, almost all of the specific inquiries addressed to I.G.E. were about matters of judgment or opinion. The expression of an unfavorable opinion and recommendation (assuming that the letters were such) does not, however, necessarily or even permissibly reflect adversely on appellant's competence or professional qualifications. Indeed, the statement of his record of 17 years of service compels the inference that he was technically qualified for the positions he had held. The mere fact that I.G.E. would not rehire him does not necessarily imply that he was either personally or professionally disqualified for employment elsewhere. It is well known that a man who for some reason or for no tangible reason does not fit into one company may and often does become a successful member of another organization.

Putting (for the purpose of argument) the worst possible construction on the admittedly true and correct statement that appellant's resignation had been submitted and accepted by mutual agreement, it appears that the concluding statement, far from being a "knockout punch" (Op. Br. p. 10), does no more than state the obvious. It goes without saying that an employee whose resignation has been submitted and accepted by mutual agreement would not likely be considered for re-engagement.

The burden of appellant's argument is that I.G.E. should have expressed a favorable opinion of appellant in certain respects, and should have restated the service letter. The argument ignores the fact that this is a libel

suit. For the purposes of this action, I.G.E. was under no affirmative duty whatsoever. Its only obligation was negative—to refrain from defamatory statements that were both false and malicious. I.G.E. was not required to say nothing but good about appellant, nor to refrain from saying anything bad about him. It was permitted to respond to inquiries, as is indicated by the statutory privilege conferred by California Civil Code, Section 47(3).

Once it is accepted that this is a libel suit, appellant's arguments are seen to be quite beside the point. It is axiomatic that everyone is entitled to his own opinion. I.G.E. stated its opinion of appellant. Under the admissions of the complaint, its statements were no more than a fair comment on appellant's record taken as a whole, the bad along with the good. The allegedly defamatory statements in the reply letters were not false and were not malicious. The allegedly false statements could not be defamatory of appellant by any stretch of the imagination. The reply letters were privileged communications, and are incapable of defamatory meaning in the light of the facts alleged in the amended complaint.

Conclusion.

On the face of the amended complaint, the reply letters are privileged communications devoid of any material false statement injurious to appellant. Appellant in fact complains of the letters only because of what he thinks they should have said but do not say. Their tenor negatives any inference of malice. They are written in ordinary, unambiguous language incapable of being understood in the defamatory sense attributed to it by the innuendo. The extrinsic facts alleged in no way alter

their character as reasonable and proper communications which appellee was privileged to publish in response to inquiries received from prospective employers. No claim in libel having been stated by the amended complaint, the judgment of the trial court dismissing the action should be affirmed.

Respectfully submitted,

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